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No. 9, Original

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS,
MISSISSIPPI, ALABAMA
AND FLORIDA
(MISSISSIPPI BOUNDARY CASE)
Defendants.

REPLY BRIEF FOR THE STATE OF MISSISSIPPI

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REPLY BRIEF FOR THE STATE OF MISSISSIPPI

I. MISSISSIPPI SOUND CONSTITUTES A JURIDICAL BAY AND INLAND WATERS OF THE STATES OF MISSISSIPPI AND ALABAMA.

In its Exceptions and Brief, the United States insists the Special Master reached the wrong conclusion in finding Mississippi Sound constitutes inland waters of the States of Mississippi and Alabama.[1] It specifically denies that the

1. The United States prior to the publication of the Baseline Committee charts in April, 1971 recognized the Sound as internal waters of the States of Mississippi and Alabama based upon various theories: (a) application of the ten mile rule or fictitious bay concept, Mississippi Exhibit 101 and Report, pp. 41-44 and 47-54 (waters enclosed between the mainland and offshore islands so closely grouped that no entrance exceeded ten miles in width were considered inland waters); (b) the ruling in *Louisiana v. Mississippi*, 202 U.S. 1 (1905), Report, p. 32 (quoting from Brief for the United States, p. 254 in *United States v. Louisiana*, 363 U.S. 1 (1960), Exhibit J-84); (c) ruling in *Pollard's Lessee v. Hagan*, 3 Howell 212 (1854), Report, p. 32 (navigable waters within state boundaries); (d) application of Article 7 (juridical bay) of the Convention, Report, p. 20 (citing Reply Brief for the United States, p. 30 in *United States v. Louisiana*, (1969), *supra*).

Sound qualifies as a juridical bay under Article 7 of the Convention on the Territorial Sea and Contiguous Zone. It further asserts that the presence of islands separating the Sound from the Gulf should be ignored or "conceptually erased" until the bay requirements are met. The effect of islands, it is said, is simply to mitigate against the rigors of the 24 mile limit on closing lines. Relying upon that fiction, the Government asserts that no part of the Sound can qualify as an "indentation" within the meaning of Article 7 unless Dauphin Island is treated as a continuation of the Alabama mainland, thereby forming a mainland headland. Even should Dauphin Island qualify as an extension of the mainland, which it denies, the United States further contends that the Sound should be dismembered by severing the eastern and western ends of the Sound as smaller juridical bays. The remaining central part of the Sound, it is argued, is no indentation at all, being nothing more than a fringe of islands fronting a relatively flat mainland shore which can be enclosed only by reliance upon Article 4 straight baselines which the Executive Branch has consistently declined to employ.[2]

The United States asserts that without treating Dauphin Island as a mainland headland there is no other way of satisfying the requirements of Article 7.[3] This argument

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2. By using bay closing lines to separate the two ends of the Sound as smaller juridical bays, the United States begs the question of whether those closing lines should be treated as part of the mainland shore in determining the depth of penetration and existence of an indentation for Article 7 analysis. (See discussion of closing lines as mainland under Article 7, *infra*, pp. 20-22).

3. Contrary to the Government's suggestion, the Special Master did not share the same conclusion. Mississippi had argued that regardless of the treatment of Dauphin Island as a mainland headland, the Sound nevertheless met the requirements of Article 7, including the 24 mile bay closing line. Having found Dauphin

(Continued on following page)

reflects a misunderstanding of the concept of "natural entrance points" set forth in Article 7 of the Convention and the theory by which a headland is permitted to be located on an island. Treatment of an island as a mainland headland is premised upon the fact that certain islands may be so closely aligned with the mainland as realistically to be considered an integral part of it. Such an island is treated as though it were continuous with the mainland shore, and the intervening waters are assimilated for all intents and purposes to the mainland regime. (See *United States v. Louisiana,* 394 U.S. 11, 62, n. 83). This headland theory as adopted by the Court supplements the provisions of Article 7. In certain instances it may permit an island which projects seaward to form the side of a bay even though it would otherwise lack natural entrance points and fails to qualify for treatment under Article 7. In this context, the Court has observed the distinction between islands which create multiple mouths to an indentation and those which by their close association with the mainland are deemed mainland headlands:

> No language in Article 7 or elsewhere positively excludes all islands from the meaning of 'natural entrance points' to a bay. * * *
>
> Moreover, there is nothing in the history of the Convention or of the international law of bays which es-

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Footnote continued—

Island constitutes a continuation of the mainland, the Master noted:

> The states contend that even if Dauphin Island is not considered a part of the mainland, then the eastern natural entrance point of Mississippi Sound is Cedar Point, and therefore the total closing line distance is still less than 24 miles (Stipulation Nos. 1 and 7) . . . . In view of my finding as to Dauphin Island, it is unnecessary for me to pass upon these contentions. (Report, p. 18, n. 7).

tablishes that a piece of land which is technically an island can never be the headland of a bay. Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentations in the mainland and that islands off the shore are not headlands but at most create multiple mouths to the bay.

Article 7, on the other hand, recognizes that coastal waters may be enclosed by offshore islands, and that such islands together with the mainland shore may form more than one entrance to an indentation by creating "multiple mouths" which are in turn defined by reference to lines connecting the "natural entrance points" located on each of the islands. The effect of islands in creating natural entrance points is explored at greater length in Mississippi's Exceptions and Brief, pp. 29-34.

Mississippi Sound is a classic example of islands which form multiple mouths to an indentation. A map of the Sound shows the area to be an enclosed arm of the sea bounded on the north, east, and west by mainland. To the east the Sound is separated from the open Gulf of Mexico by a series of barrier islands and intervening passes with the islands occupying more than fifty percent (50%) of the boundary with the Gulf. For purposes of this litigation, the parties agree that Mississippi Sound meets the semicircle test of Article 7(3) (Stipulation No. 9); that the water gap distances between Isle au Pitre, Louisiana, and Dauphin Island, Alabama total 21.7346 nautical miles (Stipulation No. 6); and that the pass between Dauphin Island and Cedar Point, Alabama is no greater than 1.6 miles (Stipulation No. 7).

A. The Mississippi Barrier Islands Create Multiple Mouths to the Sound and Define the Area of an Indentation.

The United States contends that the Sound is not a bay at all. It advances the argument that Article 7 takes islands into account only where a pre-existing bay-like indentation is established. It says that the barrier islands which clearly create multiple mouths to the Sound must be "conceptually erased" for verifying the character of the Sound as an indentation. Disregarding those islands, the United States submits that no "indentation" exists and that the mainland shore of the Sound is a gentle curvature of the coast and provides no justification for applying the rules for islands forming multiple mouths.[4] The absurd consequences of the Government's argument is plain to see in the case of the Mississippi Sound where the failure to properly apply Article 7 could leave three large enclaves of high seas within the territorial boundaries of the State of Mississippi. As Justice Holmes has observed, "a fiction [should] not [be] allowed to obscure

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4. In its Reply Brief in *United States v. Louisiana*, (1969), the United States distinguished the treatment of Mississippi Sound as inland waters from the configuration of "outer Vermillion Bay" by characterizing the Mississippi barrier islands as "islands in the mouth of an indentation." It argued: "Louisiana cites a variety of materials to support its contention that a bay may be created by the presence of islands in the open sea. Many of them, however, relate to islands in the mouth of an indentation—an entirely different matter. Mississippi Sound, referred to by Louisiana, is such a situation." (p. 30, Exhibit J-66).

Moreover, G. Etzel Percy, then Geographer for the State Department, writing in the June 29, 1959 *Bulletin of the State Department* patently considered Mississippi Sound to constitute a well-marked indentation when he stated:

> Bays, because of the placement of islands in the vicinity of their entrances, may have several channels of ingress . . . . Situations of this kind abound along some portions of the coast. The one of most impressive dimensions is Mississippi Sound, partially closed off by a series of sandy islands. (p. 965).

the facts, when the facts become important." *Blackstone v. Miller,* 188 U.S. 189, 204 (1903).

Suffice it to say at this juncture that the Government's analysis is the result of importing ambiguity in its reading of the Convention where none exists. Quite expressly, Article 7(3) describes the role of islands in defining the area of an "indentation." It defines the term "indentation" by circumscribing the area which it is to occupy. In this respect, Article 7(3) provides, *inter alia*:

> For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths.

This Court has concluded that the lines drawn across the various mouths are to be the baselines for all purposes. *United States v. Louisiana,* (1969), p. 55. In this context, the Court further held:

> There is no suggestion in the Convention that a mouth caused by islands is to be located in any manner different from a mouth between points on the mainland—that is, by 'a line joining the low-water marks of natural entrance points.' (p. 56).

In its subsequent discussion of islands creating natural entrance points, the Court concluded that the fact that the indentation is defined in terms of the "low-water mark around the shore" does not necessarily mean the low-water mark must be continuous. *United States v. Louisiana,* (1969), p. 61. The conclusion is inescapable that islands play an important role in defining the limits of

the indentation since the low-water marks along the shores of the mainland and islands together with the lines joining the natural entrance points of the multiple mouths form the perimeter of the indentation.

Mississippi contends that the initial and dispositive inquiry in determining the existence of an indentation under Article 7 is whether the barrier islands can be said to create multiple entrances to the enclosed waters of Mississippi Sound. That inquiry is one of fact. In *United States v. Louisiana,* (1969), the Court noted:

> The United States argues—in addition to its contention that it does not meet the semicircle test—that 'Ascension Bay' is not a true bay because it is a 'mere curvature of the coast' rather than a 'well-marked indentation' containing 'landlocked waters.' . . . Whether an indentation qualifies as a bay under the criteria of Article 7 other than the semicircle test is a *factual question* which should be submitted to the Special Master in the first instance. (394 U.S. 11, 48, n. 64). [Emphasis supplied].

The Master[5] concluded that the Sound met the 24 mile closing line test for a bay. Implicit in that conclusion was the finding that the intervening passes between the barrier islands formed multiple mouths to the Sound and that it qualified as an indentation. The Master personally viewed the area, received the exhibits, and had the benefit of expert testimony regarding the influence of the barrier islands. Under these circumstances, the Master's findings are not clearly erroneous, but, to the contrary, are fully consistent with the requirements of Article 7 and opinions

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5. Special Master Armstrong has served in the capacity of Master in Submerged Lands cases for the past fifteen (15) years beginning with his appointment in *United States v. Louisiana,* (1969).

of this Court. It is therefore submitted that the Master's factual findings that Mississippi Sound is a well-marked indentation should be affirmed.

Contrary to its earlier position,[6] the United States currently contends that the Mississippi barrier islands are islands in the open sea and should neither be permitted to form multiple mouths or entrances into the Sound nor be considered as forming a part of the perimeter of the enclosed waters. The mainland shore, it is said, is at best a "gentle curvature" and no bay-like indentation at all. To qualify as an indentation for which islands may create multiple mouths, the Government argues the indentation must be wholly within the mainland coast and have well-marked mainland headlands such that it may be deemed to lie *inter fauces terrarum.*[7]

A map of the area shows that the Louisiana Marshes of which Isle au Pitre is concededly a part form a prominent cape or headland on the west. To the east, however, the Government would dismiss not only Dauphin Island but Mobile Point and Cedar Point as forming part of an indentation which would include Mississippi Sound. It states that Mobile Point is a headland for Mobile Bay which must be treated independently as a separate indentation and, therefore, cannot form a headland for Mississippi Sound; moreover, it points out that the water distance between Mobile Point and Isle au Pitre would exceed the 24 mile limit for bays. Likewise, it is argued that Cedar Point is a headland for Mobile Bay but not to the Sound to the west, and unless Dauphin Island qualifies

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6. See footnote 2, *supra*.

7. The International Court of Justice in its opinion in the *Fisheries Case*, ICJ Reports 116, 130, recognized that waters between islands or islands and the mainland lay *inter fauces terrarum*. Also [illegible] discussion of effect of islands in forming part of an indentati[illegible]. Mississippi Exceptions and Brief, pp. 30-31.

as an extension of the mainland the Sound lacks the natural entrance points necessary to establish a mouth or form part of an indentation. The fiction thus advanced by the United States cannot conceal the geographic facts. Those facts establish that the Mississippi mainland shore is recessed an average of approximately ten (10) miles from the general trend of the coast between Florida and Alabama to the east and the St. Bernards Parish in the Louisiana Marshes.

The United States in its search for a pre-existing indentation rejects the provisions of Article 7(3) that islands which form multiple mouths to an indentation be taken into account in circumscribing the area of the indentation. It says the first step in defining the indentation is to detach any interconnecting tributary bays which cannot reasonably be deemed parts of a single, unitary indentation. (See subsection C, *infra*, p. 23; also see 394 U.S. 11, 51 and Report, p. 10, n. 7). The tributary bay is closed with a closing line joining the natural entrance points of its mouth, and the closing line together with the low-water mark along the shore forms a part of the perimeter of the indentation. (Article 7(3)).

Consequently, Mobile Bay must be deemed a separate indentation from Mississippi Sound inasmuch as the channel of communication between the two areas is so narrow that it cannot reasonably be said that they form a single, unitary indentation. The closing line is drawn between the northeastern tip of Dauphin Island and Cedar Point. That closing line has the same effect in forming the perimeter of an indentation as the low-water line along the mainland shore. The fact that Dauphin Island is actually connected to the mainland by a closing line is not addressed by the Government in its argument. To the contary, the

United States asserts that Dauphin Island cannot be considered to form a part of an indentation which would include Mississippi Sound unless the island can realistically be treated as a continuation of the mainland. Again, the Solicitor General appears to confuse analysis under Article 7(3) with the supplemental theory of mainland headlands.

Dauphin Island helps constitute Mississippi Sound as a well-marked indentation under Article 7 by two separate analyses: first, that it forms a part of an indentation with the mainland shore as a consequence of the closure of Mobile Bay to the east as a separate bay from Mississippi Sound; and, second, that the island together with the remaining Mississippi barrier islands create multiple mouths to the Sound. Aside from a straightforward analysis under Article 7, the Special Master correctly concluded Dauphin Island also constituted an extension of the Alabama mainland. His finding in that respect is treated in Subsection B. It is enough at this point to note that treatment under Article 7 reaffirms the Master's treatment of Dauphin Island as forming part of a well-marked indentation.

The United States, nevertheless, persists in its assertion that Article 7(3) does not permit natural entrance points to be located on islands (*i.e.* form multiple mouths or "well-mark" an indentation) unless the islands can realistically be treated as a mainland headland. One exception to the rule is admitted for islands which form multiple entrances or mouths to a pre-existing bay. Although the State of Mississippi disagrees with the Government's analysis as explained herein and in its Exceptions and Brief, pp. 17-39, it is submitted that even under that analysis Dauphin Island establishes the Sound as a well-marked indentation regardless of its treatment as a mainland headland.

The Special Master in making his findings of fact stated:

> Dauphin Island is directly in the mouth of Mobile Bay, which is admittedly a juridical bay. Its closing line as established by the Baseline Committee extends westward from the western extremity of Dauphin Island to Little Dauphin Island, thence along the northeast coast of Little Dauphin Island to North Point, thence to Cedar Point. (See Nautical Chart 11376, Joint Exhibit 1). It appears to be agreed that all waters north of this line are inland waters. Thus, Dauphin Island at least touches upon (and, if Little Dauphin Island is considered a part of it, is substantially coextensive with) inland waters of the state of Alabama. (Report, p. 14).

Dauphin Island extends westwardly from Mobile Bay approximately 14.75 miles roughly paralleling the mainland coast to the west of Cedar Point and separating the waters of the eastern part of the Sound from the open Gulf to the south. (Report, pp. 16-17). Dauphin Island by forming multiple mouths to Mobile Bay comes squarely within the exception recognized by the Government and is accorded a special status which permits natural entrance points to be located on it for purposes of drawing closing lines to Mobile Bay. Its special status is not diminished with respect to Mississippi Sound which it partially encloses. There it also forms the easternmost natural entrance point to Mississippi Sound and well-marks its character as an indentation.

The remaining barrier islands together with the natural entrance points on Isle au Pitre and the western tip of Dauphin Island create multiple mouths to enclosed waters to the north. The lines joining the natural entrance points together with the low-water marks along the main-

land shore and islands confirm the Sound as a "well-marked indentation containing landlocked waters."[8]

B. Dauphin Island Is an Extension of the Alabama Mainland.

As discussed in the foregoing section, the State of Mississippi has asserted that Mississippi Sound constitutes a juridical bay regardless of the treatment accorded Dauphin Island as an extension or headland of the mainland. In view of his finding that Dauphin Island qualified as a mainland headland, the Master found it unnecessary to address that alternative argument. (Report, p. 18, n. 7).

While treatment of islands as a part of the mainland territory of a nation is not entirely new under international law[9] or American jurisprudence,[10] the Court in *United States v. Louisiana,* (1969) first adopted the concept to supplement the provisions of Article 7 of the Geneva Convention on the Territorial Sea and Continguous Zone. The Court recognized that under Article 7 the role of islands is generally restricted to that of creating multiple mouths to a bay.[11] The Court went on to hold that nothing in the

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8. It is stipulated that the water gap distances between the entrances to the Sound are less than 24 miles and that it meets the semi-circle test. (Stipulations 6, 7, and 9).

9. See *United States v. Louisiana,* 394 U.S. 11, 64, n. 84.

10. See *Louisiana v. Mississippi,* 202 U.S. 1, 45-46.

11. Article 7(3) of the Convention does not employ the term "bay" since that is a conclusion to be subsequently verified by application of the semi-circle test. Instead, it uses the term "indentation". Although a bay is by definition an indentation, the reverse is not necessarily the case. Neither does Article 7(3) refer to islands in or at the mouth of an indentation. Rather in precisely chosen language it provides: "Where, because of the presence of islands, an indentation has *more than one mouth.* . . ." [Emphasis supplied]. Had the drafters of the Convention intended the language to limit consideration of islands to situations

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Convention or elsewhere prevented an island from being considered in effect a continuation of a mainland formation. In referring the matter to the Special Master, the Court stated:

> While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as a part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast. We leave to the Special Master the task of determining in the first instance—*in light of these and any other relevant criteria and evidence he finds helpful to consider*—whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the 'coast' within the meaning of the Convention on the Territorial Sea and Contiguous Zone. (394 U.S. 66). [Emphasis supplied].[12]

Footnote continued—

in which they "lay at the mouth of a pre-existing bay or indentation" they would have stated so. Nothing in the *travaux* to the Convention suggest so narrow a construction. (See Mississippi's Exceptions and Brief, pp. 17-39). The important factual consideration recognized by Article 7(3) is not whether islands lie along a direct closing line connecting mainland headlands (*i.e.* "at the mouth (singular) of an indentation"). The language of Article 7(3) refers not to a singular pre-existing mouth of an indentation but to islands creating "more than one mouth," (*i.e.* mouths).

12. For a discussion of the term "coast" as it is used in the Convention and the understanding of its meaning by the Drafters of the Convention see Mississippi's Exceptions and Brief, pp. 34-39. Generally the term was understood to have been employed in the same sense as in the *Fisheries Case*, ICJ Reports, p. 116 (1951) to include the mainland shore, islands, and the limits of internal waters. (Cf. "Coastline" as defined in the Submerged Lands Act, 43 U.S.C.A. §1301(c); also see 394 U.S. 11, 64, n. 84).

The Court has not, as the United States would suggest, limited application of the headland theory to deltaic formation. Had the Court so desired it would have had ample opportunity to do so. The Court did observe:

> We do believe, however, that the origin of the islands *and their resultant connection with the shore* is one consideration relevant to the determination of whether they are so closely tied to the mainland as realistically to be considered a part of it. (394 U.S. 11, 64, n. 84, last paragraph). [Emphasis supplied].

The Master addressing each of the factors adumbrated by the Court concluded that Dauphin Island should be treated as a part of the mainland and thereby confirmed the Sound's character as an "indentation."

The Government urges that the Master is wrong in his ultimate factual finding, and inasmuch as the mass of underlying facts were not disputed, the Master's Report should be accorded no deference. His error it is said is one of law rather than of fact. That argument is an invitation for this Court to weigh the evidence once again and make a new factual finding in favor of the United States.

First and foremost among the Government's argument is that because other islands in other cases have been rejected as extensions of the mainland so must Dauphin Island.[13] It is clear from the factors identified by the

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13. In particular, the United States claims that the Court's decree in *United States v. Florida*, 425 U.S. 791 (1975), rejected the Florida Keys as extensions of the mainland. The Government's assertion is without foundation. It will be recalled that Special Master Maris in his Report filed January 18, 1974 specifically found the upper Florida Keys to constitute an extension of the mainland. (Report, p. 39). The United States took exception to that finding.

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Court that each island or group of islands should be judged on a case by case basis.

The United States contends that Dauphin Island's shape and size do not support the Master's finding. The island it is said, is "long and narrow." (Exceptions and Brief, p. 8). The Master considered the island's size but noted size itself is not dispositive but must be considered in relation to its shape, orientation, and distance from the mainland. (Report, p. 16). He noted in this respect

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Footnote continued—

This Court, noting that the recommendations of the Master had been made without the benefit of the arguments presented for the first time by way of exceptions, referred the exceptions to the Master for his consideration and the filing of a supplemental report. (See *United States v. Florida*, 420 U.S. 531 (1975)). In his Supplemental Report submitted December 30, 1975, the Master indicated that following that referral to him the parties reached a negotiated settlement of the issues involving the exceptions of the United States. The argument was reduced to a written stipulation and attached to the Master's Supplemental Report. The Court adopted a modified version of the written stipulation as the body of its decree. (*United States v. Florida*, 425 U.S. 791).

Even so, Paragraph 6 of the decree does not reject the Keys as extensions of the mainland but simply states, *inter alia*:

> There are no inland waters within Florida Bay, or within the Dry Tortugas Islands, the Marquesas Keys, and the lower Florida Keys (from Money Key to Key West), *the closing line of which affects the right of either the United States or the State of Florida under this decree.* [Emphasis supplied].

The written stipulation employed somewhat different wording in that it provided:

> . . . there are no inland waters within the lower Florida Keys . . . whose closing lines affect the seaward limit of Florida's Submerged Lands Act grant.

A similar provision was included in the stipulation respecting the Upper Florida Keys but was not included in the final decree. It is significant to note that Florida's territorial waters under the Submerged Lands Act extend three (3) leagues from the coasts of the mainland and islands. Waters between the mainland and islands no more than 21 miles (3 leagues) offshore would therefore belong to Florida regardless of the treatment of the area as inland waters.

that the island extended from east to west and "appears from its shape and orientation to be an elongation of Mobile Point" to the east to which it appears to have been connected in the Holocene era. The configuration of Dauphin Island, he stated, follows the curvature of the shoreline with the exception of the projection of Cedar Point 1.6 nautical miles to the north. (Report, pp. 16-17). The Master might well have noted that the eastern end of Dauphin Island appears to be a projection not only of Mobile Point but also of Cedar Point as well. Moreover, the orientation of the island is such that it shelters and encloses the eastern end of the Sound for approximately 14.75 miles (Report, p. 16) thereby linking the waters to the north more closely with the mainland shore to the north. (Also see Commentary to Article 7 prepared by the International Law Commission 2 Y.B. Int'l. L. Comm'n. 269 [1956]).

The United States claims that the fact that Dauphin Island as a whole appears to lay at right angles to Cedar Point somehow detracts from its role as an extension of the mainland. As noted above, however, the Master viewed the island as a flat continuation of Mobile Point. Moreover, the northern hook of Dauphin Island projects toward Cedar Point to the north.

The Master found the depth of the waters between the northern tip of Dauphin Island and Cedar Point to be no greater than six (6) feet except in the dredged channel.[14] He found as a practical matter that the waters could not be utilized by international shipping. The United States, however, asserts that the depth aside from the dredged channel is "some seven feet deep." It urges

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14. The Intracoastal Waterway is not a natural channel but is dredged and maintained by the Corps of Engineers. The project depth of the waterway is only twelve (12) feet.

that the Master disregarded the depth of the Intracoastal Waterway simply because it was a dredged channel. Nothing, however, in the Master's Report indicates that he disregarded the channel. To the contrary, he specifically mentions the channel. The fact that the water may be seven (7) or even twelve (12) feet does not detract from his conclusion that the waters are so shallow that they are not navigable by international shipping.

The United States points to the Master's statement that the water distance from Dauphin Island to Cedar Point, 1.6 miles, appeared to be greater than was contemplated by the Court. However, nothing in the Court's list of factors would appear dispositive in a given case. Each factor must be weighed in the context of the remaining factors and any others which may reasonably be regarded by the Master as having a bearing on the outcome. Moreover, distance is relative to the size of the island, the depth of water, and the relation to the mainland. Although the Court in its treatment of mud-lumps and low-tide elevations might have viewed 1.6 miles as excessive, in the context of Dauphin Island, with its other factors, it is submitted that the distance is insignificant. Moreover, the island, known as Massacre Island in the late seventeenth century, was perceived by early explorers sailing along the coast as being connected to the mainland.[15]

As the Master found, Dauphin Island is connected by a highway bridge from the northern tip of Dauphin Island to Cedar Point. He declined, however, to find that fact conclusive. The Master appears to have relied

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15. For instance, in 1699, d'Iberville sailing west from Mobile Bay recorded his observation. Viewing "Massacre Island" from his ship, he noted that it appeared to be attached to the mainland (no doubt at Cedar Point). (Testimony of Patricia Galloway, Transcript, p. 333).

upon the arguments of the United States that the decree in *United States v. Florida,* 420 U.S. 531 (1975); 425 U.S. 791 (1975), denied the Florida Keys the status of a mainland extension. (See footnote 13, *supra*). The decree in that case did not address the upper Florida Keys nor did it deny the lower Keys the status as extensions of the mainland. Likewise, the ruling in *United States v. California,* 447 U.S. 1 (1980), related to an entirely different question of whether a pier should be deemed a part of the "coast" under Article 8 of the Convention (harbour works). Nevertheless, the Master did take note of this Court's observation respecting treatment of the Florida Keys as mainland due, in part, to their connection by a permanent highway. (See 394 U.S. at p. 72, n. 95 final sentence).

It would appear that the Court may well have had in mind permanent highways and bridges connecting islands when it noted its belief that the "origins of the island and their *resultant connection with the shore*" may have a bearing on the treatment of islands as mainland headlands. [Emphasis supplied].

The Master noted the origin of Dauphin Island as a part of the mainland shore to the east and north. Likewise, he considered the alluvial nature of the island which developed around the mainland core. (See Report, p. 17). The United States surmises that the Master could not have accorded significant weight to the fact that, in prehistory, Dauphin Island was once a part of the mainland. The fact is the Master considered those facts as a basis for his finding.

Finally, the United States asserts that the dispositive factor for the Master was the "unique and significant" circumstance that Dauphin Island is at the mouth of Mobile Bay. The Master, however, considered that fact

only in the context of his findings as to the island's distance from the mainland. Thus, the Master's conclusion rests upon several other additional considerations.

The United States asserts that the Special Master's treatment of internal waters as mainland is without foundation and has never been endorsed by the Court or any commentator.[16] The State of Mississippi asserts that both the rulings of this Court and the Convention support the Master's conclusion.

In his Report, the Special Master states:

> There seems to be no doubt that under the Geneva Convention internal waters are to be subsumed under the general category of mainland. If this is correct, then Dauphin Island, as it adjoins the mainland, is clearly an extension thereof . . . . (Report, p. 14).

In *United States v. Louisiana*, 394 U.S. 11, 22 (1969), the Court stated:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory. . . .

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16. The United States contends that the Master's finding is irreconcilable with his rejection of Louisiana's "leap-frog argument" in *United States v. Louisiana*, (1969). The factual situations there were significantly different than here. The mud-lumps and islands failed to qualify as headlands for delimiting inland waters. The Master, having once established the area as bays, cannot be faulted in his refusal to reconstitute the bay by incorporating mud-lumps or islands near the closing line but which did not create multiple mouths to the bay.

The inland or internal waters of a nation, as the very terms suggest, are within the "coast" or mainland regime of the nation. Such waters by definition must be sufficiently closely linked to the land domain to be subject to the concept of internal waters. These were, of course, the principles upon which the *Fisheries Case, supra,* and the Convention on the Territorial Sea and Contiguous Zone are based.

Article 1 of the Convention states, *inter alia*:

> The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt sea adjacent to its coast, described as the territorial sea.

The Convention initially states the general understanding of its drafters that the term "coast" applied not only to a nation's land territory but to its internal waters as well. Thus, in depicting the baseline for the territorial sea bay closing lines are deemed a part of the coast just as is the land territory. This conclusion is confirmed by Article 3 which provides that the normal baseline for measuring the territorial sea is the low-water mark along the coast. Bay closing lines are also deemed part of the coast. The Court in the *Fisheries Case, supra,* p. 127 considered the term "coast" to include the mainland shore, offshore islands, and internal waters. (See discussion in Mississippi's Exceptions and Brief, pp. 34-39). In this context, this Court has concluded that bays are recognized as indentations in the "coast" (*United States v. Louisiana,* 394 U.S. 67 (1969) and that the terms "coast" and "mainland" were considered synonymous.

Article 11 of the Convention provides that low-tide elevations situated wholly or partly within the territorial sea as measured from the "mainland" generate their own territorial seas. In *United States v. Louisiana,* (1969),

the Court addressed the proper construction of Article 11. It held:

> It is clear that under the International Law Commission version of Article 11, the 'territorial sea, as measured from the mainland' included those portions which extended from baselines enclosing bays. The sole purpose of the amendment to the initial proposals was to indicate that 'drying rocks and drying shoals could only be used once as points of departure for extending the territorial sea and that the process could not be repeated by leap frogging, as it were from one rock or shoal to another.'
>
> The United States contends that by changing the language of the International Law Commission draft to its present form in the Convention, the Geneva Conference intended also to change its meaning. Precisely the opposite conclusion, however, flows from an inspection of the history of the Convention. The amendment was advanced by the United States; *yet its explanation for the proposal contained not the slightest indication that any change in the basic meaning of the Article was intended.* Surely there would have been some discussion of the reference to the territorial sea as a measure of distance rather than as a situs had it been the purpose of the United States or the Conference to alter so significantly the meaning of prior drafts and the existing internation consensus. (394 U.S. 46). [Emphasis supplied].

In an accompanying footnote, the Court stated:

> The United States argues that its construction of Article 11 is supported by the failure of the International Law Commission to adopt a proposal of the United Kingdom to insert after the words 'territorial sea' the phrase 'as measured from the low-water

> mark or from a base line.' [Citations omitted]. *The preference of the Commission for the phrase 'as measured from the mainland' to the British terminology, however, is consistent with the view that the phrases were thought to have the same meaning.* (394 U.S. 45). [Emphasis supplied].

Moreover, there is nothing in the Convention which suggests that the "coast" (*i.e.* mainland) must be dry land. Common sense suggests that a river which empties into the sea is just as much a part of the main continent as its banks on either side. A closing line drawn across its mouth would certainly be deemed the limit of the mainland territory. (See Article 13).

Were the foregoing not ample evidence of the treatment of internal waters as part of the "mainland" or "coast", the opinions of this Court further confirm the point.

In its discussion of islands as extension of the mainland, the Court pointed out the effect on the intervening waters. It stated:

> These arguments [of the United States], however, misconstrue the theory by which the headland is permitted to be located on the island—that the island is so closely aligned with the mainland as realistically to be considered an integral part of it. *Thus viewed, there is no 'mouth' between the island and the mainland.* (394 U.S. 62, n. 83). [Emphasis supplied].

The Court not only assimilates the island to mainland but the intervening water as well, such that a bay closing line is not required to be drawn from the island to the mainland shore.

Similarly, in its analysis of Article 7, the Court has recognized that tributary bays may be closed off from a

larger indentation where the two cannot reasonably be considered a single unit. The closing line so drawn is substituted for the low-water mark around the shore used in creating an indentation. In such fashion the internal waters of a separate tributary bay are deemed to be mainland for purposes associated with delimitation and sovereignty.

C. Mississippi Sound Constitutes a Single Indentation.

Mississippi Sound joins Mobile Bay on the east through a narrow strait between Dauphin Island and Cedar Point, Alabama. Lake Borgne is a tributary bay adjacent to the Sound at its western extremity. This western portion of Mississippi Sound and Lake Borgne penetrate deeply into the mainland. Likewise, the eastern end of the Sound forms a pronounced concavity in the mainland coast if Dauphin Island is considered an extension of the Alabama mainland.

In the alternative, the United States contends if Dauphin Island is deemed a part of the mainland the Master erred by focusing his attention upon the Sound as a single unit. It is argued that the Master in selecting the natural entrance points should have recognized two distinct and unconnected bays: one on the west comprising Lake Borgne and that portion of Mississippi Sound enclosed by a line extending from Isle au Pitre to the mainland on the north; the other to the east by a line drawn from the western terminus of Dauphin Island and Point Aux Chenes on the Mississippi mainland.[17]

The Court in *United States v. Louisiana*, 394 U.S. 11, 50-52 (1969) addressed the same question in its discussion

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17. This argument is advanced by the United States for the first time by way of Exception.

of Vermilion Bay as a tributary bay to "Outer Vermilion Bay". The Court, noting the United States' argument there, stated:

> The United States does not reject the notion that some indentations which would qualify independently as bays may nonetheless be considered as part of larger indentations for purposes of the semicircle test; but it denies the existence of any rule that all tributary waters are so includable. (p. 51).

The Court agreed and held:

> The inner bays can be included, therefore, only if they can reasonably be considered part of the single outer indentation, and that cannot be said of inland waters which, like Vermilion Bay and Barataria Bay—Caminada Bay, are wholly separated from the outer body of water and linked only by narrow passages or channels. (At 51).

With respect to the treatment of interconnecting indentations it stated:

> 'Outer Vermilion Bay,' if it is to qualify under the semicircle test, must include the waters of Vermilion Bay. Yet Vermilion Bay is itself a part of the much larger indentation which includes West and East Cote Blanche Bays and Atchafalaya Bay, and which opens to the sea between Marsh Island Point au Fer. Recognition of the unitary nature of this larger indentation follows from Louisiana's insistence that the low-water mark must be followed around the entire indentation. (p. 52).

The test again is one of fact. Although connecting indentations might qualify as separate bays if considered independently, the test is whether the entrance between the two water bodies is so narrow that they cannot reasonably

be deemed parts of a single, unitary indentation. In those instances, the tributary bay is closed by a closing line with the result that in tracing the low-water mark along the shore of the outer indentation waters so closed off will be deemed mainland.[18]

When applying the foregoing test it is clear that Mobile Bay must be treated as a separate and independent indentation since it is connected to the Sound by a narrow channel between the northern tip of Dauphin Island and Cedar Point.

Neither of the "smaller" bays proffered by the United States meet the test established by the Court for excluding a bay from that of a larger unitary indentation. Neither of the suggested closing lines between Isle au Pitre and the Mississippi mainland to the north or the closing line between the western terminus of Dauphin Island and Point Aux Chenes on the mainland to the northwest are justified by the geographical facts. There is no noticeable constriction of the Sound in either instance. The Sound averages approximately ten (10) miles in width broadening to a greater distance in its western extremity. (See diagram appended as Chart 3 to the Exceptions and Brief of the United States). The only justification which the United States gives for dismembering the Sound by forming sub-bays is that "it seems natural" to do so. (Exceptions and Brief, pp. 16-17). The State of Mississippi submits that argument is not only contrary to the language of Article 7 and the direct precedent of this Court, but also contrary to the very arguments which the United States espoused in its boundary dispute with Louisiana in 1968. (See Brief

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18. In the context of Article 11, the Court has previously concluded that the International Law Commission which prepared the draft Convention considered the terms "baseline" and "mainland" as having the same meaning. 394 U.S. 11, 45 especially n. 58.

for the United States, pp. 59, 103-104 in *United States v. Louisiana*, (1969)).[19]

II. MISSISSIPPI SOUND CONSTITUTES HISTORIC INLAND WATERS.

The United States admits the Master's findings of fact, but denies the legal significance of those facts in supporting a claim to Mississippi Sound as an "historic bay". (Exceptions and Brief for the United States, p. 20). It states in this respect:

> Here, also, only the Master's legal reasoning is implicated; and the Court can assess the correctness of his conclusion without going beyond the facts recited in the Report itself. (p. 20).

Consequently, the State of Mississippi will not attempt to lay before the Court the wealth of documentary evidence available to the Special Master. Suffice it to note that the Master found as a matter of fact that the United States accepted Mississippi Sound for more than a half century as inland waters. (Report, pp. 53-54; also see footnote 1, *supra*).[20] Neither does the United States take issue with

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19. In its discussion of subsidiary indentations, the United States stated:

> One suggestion is to apply the semicircle test first to each tributary area separately drawing the appropriate closing line for each one that meets the test, and then to count as part of the main indentation only those tributary areas that cannot be closed off from it as separate bays by this process. . . . That procedure may be unduly restrictive, as applied to open areas like West Bay that have some substantial unity with the outer area. (pp. 103-104).

20. The Master noted that although the states had historically exercised jurisdiction over the Sound, it was not of such nature as to form a predicate for an inland water claim since it was equally consistent with recognition of the Sound as inland waters or territorial waters. Accordingly, Mississippi will limit its discussion to those policies and actions of the United States which may form the basis of an historic bay claim.

the Master's finding that the United States prior to the effective date (September 10, 1964) of the Convention on the Territorial Sea had adopted a policy of enclosing as internal waters those areas between the mainland and offlying islands which were so closely grouped that no entrance exceeded ten (10) nautical miles in width. (Report, pp. 41-44 and 48-54).[21]

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21. See Shalowitz, *Sea and Shore Boundaries* (1962), Vol. I, pp. 112 and 161. Similarly, in its Brief for the United States in *United States v. California*, (1965), the Government distinguished its treatment of Santa Barbara Channel from that of Chandeleur Sound in stating:

> California attempts to analogize the Santa Barbara Channel to Chandeleur and Breton Sounds, in Louisiana, which the United States has recognized as inland waters (Brief, 33-34, n. 14; 82; 106-108). For present purposes, it is enough to observe that the widest entrances into Chandeleur and Breton Sounds are six miles, between Breton Island and Bird Island, and slightly less than ten miles, between Ship Island and the northernmost tip of the Chandeleur Islands. See U.S. Coast & Geodetic Survey Chart No. 1115. Thus, our concession as to Chandeleur and Breton Sounds involved no breach of the ten mile limit. Other aspects of California's analogy are discussed *infra*, pp. 153-155. (At p. 113).

Likewise, in its Brief for the United States filed in *United States v. Louisiana*, (1969), the Government further stated:

> Prior to the Convention there was no international consensus, but the United States had taken the position that such areas were inland waters at least in some circumstances. Accordingly, in all proceedings in this case and its predecessor prior to 1964, we treated Chandeleur and Breton Sounds as inland waters.
>
> The 1965 decision in *United States v. California*, 381 U.S. 139, holding that the baseline is to be drawn in accordance with the 1961 Convention, showed our assumption to be wrong. Nevertheless, we do not now claim for the United States the areas previously assumed to be inland waters, because we think it would not be in the public interest to upset, at this date, a postulate that has guided the conduct of both parties and their lessees in a large area over a long period of time. But since the concession related to specific areas and was expressed in geographic terms, we should not be precluded from relying upon the Convention in resisting Louisiana's effort to add adjoining waters, never within the concession, to those we are willing to conceded. (pp. 121-123).

(Continued on following page)

The United States has abandoned its claims to the Sound as inland water, and now disclaims the effect of its earlier assertion of inland jurisdiction and sovereignty. Its disclaimer, arising as it does during the course of litigation, is ill-advised, unreliable, and at best self-serving. This Court in *United States v. Louisiana*, (1969), cautioned:

> The Convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as we suggested in United States v. California, it would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government *to distort these principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events.* (p. 77). [Emphasis supplied].

In this respect the Court noted:

> It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another *to allow the United States to prevent recognition of historic title which may already have ripened because of past events* but which is called into question for the first time in a domestic lawsuit. *The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in United States v. California.* (p. 77, n. 104). [Emphasis supplied].

Footnote continued—

Also see 1972 Charney Letter, respecting treatment of Chandeleur Sound as a "fictitious bay," Mississippi Exhibit 101 and November 13, 1951 Letter of Acting Secretary of State James E. Webb to the Attorney General, Subsection (f), Joint Exhibit 106; Report, p. 52).

A. Elements for a Claim to Historic Waters.

Article 7(6) of the Convention on the Territorial Sea states that the requirements relating to juridical bays have no application to "historic bays." In *United States v. Alaska,* 422 U.S. 184 (1975), the Court held that in order to establish its claim to a body of waters as an historic bay, a coastal nation must have traditionally asserted and maintained dominion with the acquiescence of foreign nations. The Court stated in this regard that three factors are significant in determining the historic bay status: they are: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; (3) foreign states must have acquiesced in the exercise of authority. Proper assessment of the legal significance of these factors depends upon the scope of the authority exercised, the acts by which the authority is exercised, the effectiveness of the authority exercised, the continuity of the exercise of authority, and the toleration and inaction of foreign nations. (See Juridical Regime of Historic Waters, Including Historic Bays, 2 Yearbook of the International Law Commission, 1962, pp. 1, 13-19). It is to those considerations we now direct our attention.

B. Scope of Authority Asserted.

The Special Master correctly found the Mississippi Sound was treated as inland waters by the United States' long standing policy of enclosing as inland waters sounds and straits which served as a channel of communication to an inland sea where none of the entrances exceeded the ten (10) mile rule. Moreover, he found the Sound had been specifically treated as inland waters by this Court in *Louisiana v. Mississippi,* (1905) and was conceded by the United States to be inland waters in *United States v. Louisiana,* (1960). In addition, this Court took note of that

concession in its opinion in the latter case. (363 U.S. 66, n. 108 and 82, n. 135). In its brief, the United States conceded:

> As in the case of Louisiana (*supra*, p. 177), we need not consider whether the language, 'including the islands' etc., would of itself include the water area intervening between the islands and the mainland (though we believe that it would not), because it happens that all the water so situated in Mississippi is in Mississippi Sound, which this Court has described as inland water. *Louisiana v. Mississippi*, 202 U.S. 1, 48. The bed of these inland waters passed to the State on its entry into the Union. *Pollard's Lessee v. Hagan*, 3 How. 212.

The Solicitor General candidly admits:

> We cannot of course, avoid the point that in our 1958 Brief in Support of Motion for Summary Judgment on Amended Complaint, we construed *Louisiana v. Mississippi* as describing Mississippi Sound as inland water which therefore passed to the States on their entry into the Union. (Exceptions and Brief, p. 30).

He could have further noted that the United States was relying upon the authority of *Louisiana v. Mississippi*, in distinguishing its treatment of the Sound from the Chandeleur Islands as late as 1969. In its Brief in *United States v. Louisiana*, the Government stated:

> Nor does *Louisiana v. Mississippi*, 202 U.S. 1, support Louisiana. The opinion recognized Mississippi Sound as inland waters (202 U.S. 48), but did not so characterize Chandeleur or Breton Sounds or recognize Chandeleur Islands as part of Louisiana's coast. (p. 124).

The United States appears to argue that Mississippi's historic bay claim must fail because no Japanese fishing trawlers have been arrested or excluded from Mississippi Sound. (See Exceptions and Brief, pp. 21, 33). The absurdity of the Government's argument is amply demonstrated by the shallowness of the Sound. Only the shallowest draft coastal vessels and barges are suited to the interior navigation of the Sound. It, like Chandeleur Sound, is a *cul-de-sac*, not a route of international traffic. While exclusion of navigation might provide some evidence of exercise of authority over the subject waters, it is by no means an indispensible requirement as the United States suggests.

In *United States v. Alaska*, 422 U.S. 184 (1975), the Court found the routine enforcement of domestic fish and game regulations failed to provide adequate notice of a claim to the disputed areas as inland water. It stated:

> . . . the regulations were not commensurate in scope with the claim of exclusive dominion essential to historic title. Each afforded foreign vessels the same rights as were enjoyed by American ships. (422 U.S. at 198).

The Court also held:

> . . . [T]he exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation. The enforcement of fishing and wildlife regulations, as found by the District Court, was patently insufficient in scope to establish historic title to Cook Inlet as inland waters. (At 197).

In its discussion of "historic bays" the Court cited a study prepared by the United Nations Secretariate entitled "Juridical Regime of Historic Waters, Including

Historic Bays" (422 U.S. 200). That document provided, *inter alia*:

> The first requirement to be fulfilled in order to establish a basis for a title to 'historic waters' can therefore be described as the effective exercise of sovereignty over the area by appropriate action on the part of the claiming state. (2Y.B. ILC, 1962, p. 15) (UN Doc. A/CN .4/ 143).

The study further explains:

> *This does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations with in or with respect to the area claimed.* It is not impossible that these laws and regulations were respected without the state having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken. (*Supra*, p. 15). [Emphasis supplied].

It is not essential, therefore, that the United States or the State of Mississippi resort to arrest of foreign vessels within the Sound to call attention to its claims or to prove acquiescence of foreign nations. Mississippi Sound, unlike Santa Barbara Channel or Cook Inlet, is generally non-navigable by ocean going vessels such that it is unnecessary for the United States to exercise its right of exclusion. Neither is the United States required to exercise all of the rights or duties which are included in the concept of sovereignty.

If the Master was correct, as it is submitted he was, in his factual finding that the policies and actions of the Federal Government constituted a claim to Mississippi

Sound as inland waters, that assertion of sovereignty is fully commensurate in scope with a claim of exclusive dominion, including the power to exclude any foreign vessel which might attempt for some unknown reason to enter the Sound. Such a claim is at the very heart of the theory of "historic bays."

C. Acquiescence by Foreign Nations.

The study of historic waters prepared by the United Nations Secretariate states as follows:

> In any case, nobody seems to demand that the coastal state formally notify each and all of the foreign States that it has assumed sovereignty over the area, before the time necessary to establish the usage begins to run. If that is so, the notoriety of the situation, the public exercise of sovereignty over the area, would in reality be sufficient. (p. 19).

Accordingly, arrest or exclusion of foreign vessels is significant only to the extent that it asserts an indisputable assertion of inland water status and sovereignty. Where there is no challenge to such a claim asserted by a coastal nation, other evidence of acquiescence may be sufficient to establish historic waters treatment.

The Special Master found that no foreign government has ever protested the United States' claim to Mississippi Sound as inland waters. In response to Mississippi's First Set of Interrogatories dated September 26, 1980, the United States filed a supplemental answer to Interrogatory No. 37. The interrogatory had asked the United States to identify any protests or opposition by any foreign governments to the treatment of the Mississippi Sound as inland waters. In its response, the United States answered:

> The Department of State has no record of any such objection. (Supplemental Answer to Interrogatory 37, dated June 9, 1982).

With respect to the toleration and inaction of foreign governments, this Court stated in *United States v. Alaska*, (1975):

> Scholarly comment is divided over whether the mere absence of opposition suffices to establish [historic] title. [Citation omitted]. The Court previously has noted this division but has taken no position in the debate. [Citation omitted]. *In this case,* we feel that something more than mere failure to object must be shown. The failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or *reasonably should have known of the authority being asserted.* (p. 200).

The lack of opposition to the United States' claims is hardly surprising in view of the geography of the coast, the shallowness of the waters and inaccessibility of the Sound to international shipping, the absence of the international shipping lanes in the vicinity, and the fact that it leads only to United States territory. Moreover, the United States' claim could have been easily validated by the adoption of straight baselines. Any objection would under those circumstances be of little significance and affect no important freedoms and rights of the international community of nations or international users. On questioning by the Special Master at trial, Professor Bowett who testified on behalf of the United States stated that the fact that Mississippi Sound is enclosed by a continuous belt of territorial waters across its entrance strengthens any claims it may have to the waters as an historic bay. (Transcript, pp. 1881-1890).

Yet, assuming that something more may be required in this circumstance to establish that foreign governments "knew or reasonably should have known" of the United States' claim to the Sound, Mississippi contends that requirement has been met. The views of foreign countries are particularly strong evidence of the notoriety given to the United States' policy. Other nations have the strongest interest in clearly understanding the United States' policy in order to make known any objections they may have. Had the United States refused to recognize sounds formed by offshore islands and the mainland shore, it would be expected that the United Kingdom would have pointed out so significant a fact in opposing Norway's claims before the International Court of Justice in the *Fisheries Case.*

Perhaps the most significant evidence of the United States' policy and claims to inland waters is an Aide-Memoire from the State Department to the Norwegian government. The Norwegian Embassy had by a diplomatic memorandum dated September 9, 1949 made inquiry of the United States respecting its delimitation of inland and territorial waters.[22] In its Aide-Memoire the State Department stated, *inter alia*:

> The chief developments in the subject in the field [delimitation of territorial waters] of United States Federal legislation, executive pronouncements, and legal decisions since 1929, are as follows: . . . The Federal Government is now in dispute with the State of California with respect to the location of the boundary line between the territorial sea and inland waters.

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22. Approximately three weeks later on September 28, 1949, the United Kingdom filed its Application instituting proceedings before the International Court of Justice in the *Fisheries Case* (*United Kingdom v. Norway*, ICJ Reports 118 (1951)).

See U.S. v. State of California (decree of October 27, 1947) and case now pending before the United States Supreme Court.

* * *

With respect to the demarcation of the line separating inland waters from the territorial sea, and to the geographic method of delimiting the territorial sea, the Embassy's attention is invited to the proposals made by the United States Delegation to the Hague Conference of 1930 with respect to the various Bases of Discussion of territorial waters there considered. (Exhibit J-115, pp. 1, 4-5).

Both at the Hague Conference in 1930 and in the proceedings before this Court, the United States had taken the position that waters between islands and the mainland forming sounds or straits should be treated as inland waters if the individual entrances did not exceed ten (10) nautical miles. (Compare letter dated November 13, 1951 from Acting Secretary of State James E. Webb to the United States Attorney General, Subsection (f), "Straits, particularly those situated between the mainland and offshore islands." Joint Exhibit 106: also see Proposal of the United States at the Hague Conference, Joint Exhibit 97, p. 201).

This policy of the United States was cited and discussed at length by both the United Kingdom and Norway in the *Anglo-Norwegian Fisheries Case* in support of their respective positions. In their briefs and oral arguments before the Court, Norway and the United Kingdom each pointed to the United States' practice of enclosing waters between offshore islands and the mainland as internal waters. The principal dispute between the parties was whether the individual openings between islands or islands

and the mainland should be limited to the ten (10) mile rule employed for bays. The opinion of the Court states that copies of the pleadings of the parties in that case were provided upon their request to the governments of Belgium, Canada, Cuba, Iceland, Sweden, Venezuela, and the United States. Following the entry of the Court's judgment, the pleadings of the parties were made accessible to the public. (*Fisheries Case*, ICJ Reports, p. 119 (1951)).

In its Contre-Memoire, Norway cited Secretary of State Seward's (1863) recognition of the Cuban cays as forming the exterior coastline of Cuba in support of its claims. (*Pleadings, Oral Arguments, Documents, Fisheries Case* (*United Kingdom v. Norway*) Vol. I, Para. 461-62, pp. 484-485). In this respect, Norway stated: "Autrement dit, le systeme American est le meme, a cet egard, que le systemen norvegien." (In other words, the American system is the same, in this respect, as the Norwegian system. (Para. 462, p. 486)). In its Reply, the United Kingdom stated:

> Certainly, the above passage concerning the Cuban cays indicates that the United States then recognized the possibility of islands by their particular configuration actually enclosing areas [as inland waters] of sea. But that is a very different thing from recognizing a right to establish a purely national enclosure of areas of seas by joining on the outside of the fringe arbitrarily selected points regardless of whether the areas are in fact enclosed by the physical formations. (*Pleadings*, Vol. II, Para. 332, pp. 535-536).

Both Norway and the United Kingdom cited in support of their positions the United States' argument in the *Alaskan Boundary Arbitration* (1903). (Vol. I, Para. 446, p. 477; Vol. II, Para. 336, pp. 538-539). The United Kingdom, referring to the argument of the United States, stated:

Having cited a passage from Hall's[23] *International Law* on the Cuban Archipelago de los Canarios and Lord Stowell's judgment in *Anna*, the argument proceeded with the following two sentences which are given in the Counter-Memorial:

> 'It thus appears that from the outer coastline of a maritime state, as defined in physical geography, is invariably measured under international law, the limit of that zone of territorial water generally known as the marine league. The boundary of Alaska—that is, the exterior boundary from the outer edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands.'

It further stated that the United States had argued that the openings between the islands were less than ten miles. It observed that the brief of the United States had explained as follows:

> When 'measured in a straight line from headland to headland' at their entrance, Chatham Strait, Cross Sound, Sumner Strait, and Clarence Strait, by which this exterior coast line is pierced, measure less than ten miles. (*Pleadings*, Vol. II, Para. 336, pp. 538-539).

The United Kingdom asserted that only straits and sounds which met the ten (10) mile rule qualified as inland waters. In this respect it stated:

> If a strait or *sound* between a mainland and an island (or a low-tide elevation inside the territorial belt) or between two islands, connects two parts of the open sea, the law of straits applies and each piece of territory has its own belt of territorial waters and its

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23. It is significant that the Supreme Court in *Louisiana v. Mississippi*, 202 U.S. 1, 53, decided two years later in 1905, also relied upon Hall's treatment of the Cuban cays.

> own baseline. If, however, the strait or *sound* lies between an island and the mainland and if it connects one part of the open sea, not with another part, but with inland waters, the law of bays applies, and the baseline may be joined at the nearest place to the seaward entrance where the interval does not exceed 10 miles in width . . . . *In case of doubt as to the status of a particular channel, the test is whether the channel would reasonably be used for coastwise navigation by international maritime traffic.* (*Pleadings,* Vol. I, Para. 112, pp. 78-79). [Emphasis supplied].

During its oral argument on September 27, 1981, the United Kingdom directed the Court's attention the proceedings in *United States v. California* which were then pending before the Special Master. It stated:

> It has been disclosed in hearings *before a Committee of Congress* that the Federal Government is maintaining before the master that the principles which the United States advocated at the 1930 Conference should be applied in drawing the boundary. (Pleadings, Vol. IV, p. 86). [Emphasis supplied].

It further argued:

> . . . my general point is that the Federal Government before the *Supreme Court* is vigorously maintaining the principles which it advocated in 1930, and that this fact is entirely inconsistent with the Norwegian Government's interpretation of the United States's practice. It is clear that the *Federal Government's views before the Supreme Court are perfectly in line with the United Kingdom's views in this Court.* (*Pleadings,* Vol. IV., p. 89). [Emphasis supplied].

Inasmuch as the United States' position was thus exposed to the world in the proceedings in the International

Court, the argument proffered to this Court that its policy was so unsettled as to ill afford the sort of notice upon which a claim to historic bays is based lacks credibility. Undaunted, the United States argues that proof of historic inland water requires the assertion of sovereignty ". . . must be specific to the particular body of water. Adherence to general rules that might encompass the claim now advanced will not suffice." (Exceptions and Brief, pp. 21-22). The State of Mississippi submits that the limitation urged by the Government is without foundation and should be rejected. The Court's rulings in *Louisiana v. Mississippi*, (1905), and in *United States v. Louisiana*, (1960), provide evidence of specific treatment of Mississippi Sound and Chandeleur Sound in Louisiana as inland waters.

The United States, having relied on *Louisiana v. Mississippi, supra,* in support of its treatment of Mississippi Sound as internal waters for several years, now asserts the decision did not constitute a finding that Mississippi Sound was inland waters. In all events, it contends that the United States is not bound by the ruling as it was not a party to that action.[24] (Exceptions and Brief, p. 30). That response, however, misconceives the import of the decision as it relates to a claim of historic waters. The Court has noted that in domestic disputes such as the matter *sub judice*:

> The only way to apply the Convention's recognition of historic bays to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation. (394 U.S. 77).

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24. Curiously enough, the United States contends that the States are bound by what it perceives to be the construction of Article 7 by the Court in its boundary dispute with Louisiana (394 U.S. 11). It should be noted that the States of Mississippi and Alabama were not parties to that proceeding.

Thus, the issue is whether if the United States were asserting a claim against the international community it could rely upon the Court's judgment in *Louisiana v. Mississippi*, (1905).

The rulings of various tribunals and arbitral decisions are frequently cited by nations in support of historic bay claims. In support of its claim to Long Island Sound as an historic bay, the United States having cited *Mahler v. Transportation Co.*, 35 N.Y. 352 (1866) in its unclassified briefing papers for the United Nations' Law of the Sea Conference (1958), stated: "This decision has not been disputed." (See Joint Exhibit 12, p. 32, and other examples contained therein; the same briefing papers are contained in 4 *Whitman, Digest of International Law*, 1965, 233 *et seq.*).

The decisions of the highest Court of a nation provide an important source of international law and, as such, are carefully reviewed by foreign governments as expressive of national policy. In this context, the Court's reference to Mississippi Sound in *Louisiana v. Mississippi* though not perhaps a binding judgment for the United States provides adequate notice to foreign nations of the United States' claim to the Sound as internal waters.

D. Continuous Exercise of Authority.

The Special Master having considered numerous documents regarding the United States' policy of delimiting its inland and territorial waters found the ten mile rule as applied to straits and sounds formed by offshore islands represented the publicly stated policy of the United States from 1903 to 1961 and that under that policy there was no doubt that Mississippi Sound constituted inland waters. Thus, for more than half a century the United

States has claimed Mississippi Sound as inland waters under multiple theories. (See footnote 1).

E. The United States Arguments Notwithstanding, Mississippi Sound Qualifies As an Historic Bay.

The United States maintains that despite its prior public policies regarding delimitation of inland waters, this Court should condone its decision to abandon claims of the United States and the State of Mississippi to Mississippi Sound as inland waters. It terms the effect of its prior policy as an "anachronistic inquiry" signifying nothing. It is said that regardless of its own policy and the attitude of foreign nations it must be permitted to shift national and state boundaries thereby receding from its traditional recognition and treatment of such areas as Mississippi Sound. Its refusal to acknowledge the Sound under the Convention or as an historic bay, therefore, contracts the territory of the State of Mississippi and, at the same time, conveniently transfers ownership of the submerged lands to the United States.

The United States asserts that its disclaimer to the Sound is longer standing than 1971. It argues that by its failure to issue official charts following the effective date of the Convention (1964) it was at least "impliedly recanting any claim to the Sound as inland" (Exceptions and Brief, p. 31). That argument is at odds with Article 7. While provision is made in Article 4(6) for the drawing of straight baselines on official charts, there is no similar requirement for historic bays under Article 7(6). As previously indicated, the United States in arguments before this Court was treating the Sound as a juridical bay as distinguished from the treatment of certain of Louisiana's offshore islands. (See Reply Brief for United States, p. 30 in *United States v. Louisiana,* (1969)).

CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully submits that the Exceptions of the United States to the Report of the Special Master should be overruled, and a decree entered confirming the rights of the State to Mississippi Sound as inland waters.

Respectfully submitted,

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